ORDER OF THE UNITED STATES COURT OF APPEALS

No. 73-1079

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAVE OUR CUMBERLAND MOUNTAINS, INC. et al., Plaintiffs-Appellants,

vs.

TENNESSEE VALLEY AUTHORITY, et al., Defendants-Appellees

(Filed June 14, 1973)

BEFORE: WEICK and MC CREE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

The appeal from dismissal of the complaint having come on to be heard upon briefs and oral argument, upon consideration, it is ORDERED that the judgment be, and it hereby is affirmed for the reasons set forth in the order of the district court dated October 25, 1972.

Entered by order of the court

/s/ James A. Higgins

Clerk

* * * * * * *

ORDER DENYING PETITION FOR REHEARING

[Caption Omitted]

(Filed July 11, 1973)

BEFORE: WEICK and MC CREE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

Upon consideration, the petition for rehearing is hereby denied.

Entered by order of the court

/s/ James A. Higgins

Clerk

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ORDER OF THE UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
TENNESSEE NORTHERN DIVISION

SAVE OUR CUMBERLAND
MOUNTAINS, INC., ET AL.,

vs.

TENNESSEE VALLEY
AUTHORITY, ET AL.

Civil Action No. 8035

(Filed October 25, 1972)

Plaintiffs seek declaratory and injunctive relief prohibiting the Tennessee Valley Authority (T.V.A.) from accepting delivery of coal from private contractors when tendered in trucks that are overloaded in violation of the Tennessee weight limitation statute, T.C.A. Secs. 59-1108, 59-1112. T.V.A. denies that it has police or regulatory power over private parties to enforce state statutes. It contends that it would breach it contract with its term contractors, if it rejected a tender of delivery on the ground that the delivery truck was overloaded.

The facts are essentially undisputed. T.V.A. is a wholly-owned corporation of the United States au-

thorized to generate electric power. It contracts with private mine operators for the purchase of coal, f.o.b. Kingston Steam Plant, in order to generate power at that plant. It weighs the delivery trucks before and after unloading, and it acknowledges that a "substantial number" exceed the gross maximum weight permitted under Tennessee law. None of these term contracts grant T.V.A. an option to reject delivery in overloaded trucks. It has notified the Governor of Tennessee of these violations of state law.

Plaintiff, J. W. Bradley, lives on Highway 116 over which said trucks transport coal to the Kingston Steam Plant. He deposes that around one hundred such trucks pass his house each day "practically all" of which are overloaded. He further deposes that overloading damages the state and county roads, resulting in extraordinary wear and tear on private vehicles, including his own, and creating a safety hazard to local drivers.

The T.V.A.'s motion to dismiss must be sustained. The gravamen of the complaint is the failure of T.V.A. to enforce a state statute against a non-party to this action. The facts alleged do not remotely suggest that T.V.A. is violating any federal right of immunity. See *Gully* v. *First National Bank*, 299 U.S. 108, 112 (1936). The state statute creates both penal and injunctive sanctions to prevent overloading. The Governor of Tennessee is charged with the responsibility for enforcing state laws, not the T.V.A. See *Samuels* v. *Mackell*, 401 U.S. 66; *Boyle* v. *Landry*, 401 U.S. 77; *Perez* v.

Ledesma, 401 U.S. 82; *Younger* v. *Harris,* 401 U.S. 37, 44. Accordingly, it is ORDERED that the motion to dismiss be, and the same hereby is, sustained. Rule 12(b) (1), (6) & (7), F.R.C.P.

Enter:

/s/ Robert Taylor
United States District Judge

* * * * * * *

COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF TENNESSEE
Civil Action No. 8035

SAVE OUR CUMBERLAND MOUNTAINS, INC., J. W. BRADLEY, in his individual capacity as a taxpayer of the State of Tennessee and as President of Save Our Cumberland Mountains, Inc., PLAINTIFFS,

vs.

TENNESSEE VALLEY AUTHORITY; BOARD OF DIRECTORS OF TENNESSEE VALLEY AUTHORITY; AUBREY WAGNER, Chairman, Board of Directors of Tennessee Valley Authority in his individual and representative capacity, DEFENDANTS.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

(Filed September 25, 1972)

Plaintiffs allege as follows:

I. Preliminary Statement of the Complaint

1. This is an action by a grassroots citizens group, its members, and its President, J.W. Bradley, for a declaratory judgment and a preliminary and

permanent injunction prohibiting the Tennessee Valley Authority (hereinafter TVA) from knowingly and willingly accepting coal hauled in trucks operated in violation of the weight limitations established by federal and Tennessee law. Plaintiffs, who are directly injured by this policy and practice, claim that this conduct by the TVA, a government instrumentality, frustrates sharply defined national and state policies as evidenced by specific Congressional and state enactments governing highways, the environment, and economic development and contravenes TVA's own statutory mandate and administrative regulations.

II. JURISDICTION

2. This court has jurisdiction of this case by virtue of 5 U.S.C. Sec. 701-706 (Administrative Procedure Act); 28 U.S.C. Sec. 1331(a) (Federal Question); 28 U.S.C. 1337 (Commerce); and 28 U.S.C. Sec. 1361 (Mandamus).

3. This action arises under 16 U.S.C. Sec. 831 *et seq.* (Tennessee Valley Authority Act of 1933); 23 U.S.C. Sec. 127 (Federal-Aid-Highways Act of 1956); 28 U.S.C. Sec. 2201, 2202 (Declaratory Judgment); 42 U.S.C. Sec. 4201 *et seq.* (Intergovernmental Cooperation Act of 1968); 42 U.S.C. Sec. 4321 *et seq.* (National Environmental Policy Act of 1969).

4. The amount in controversy in this case exceeds $10,000 exclusive of interest and costs.

III. PLAINTIFFS

5. SAVE OUR CUMBERLAND MOUNTAINS, INC., (hereinafter SOCM), a non-profit membership corporation incorporated under the laws of Tennessee, is a citizens group in upper east Tennessee working for a better life for the residents of the coal communities. With some 200 dues paying members living in Claiborne, Morgan, Scott, Anderson, and Campbell Counties, Tennessee, SOCM is vitally interested in the acts, policies, and practices of any government agency that work to the detriment of the economic, health, safety, recreational, conservational, and aesthetic interests of its members. Many SOCM members live near and regularly drive the numerous roads and highways over which TVA contractors haul coal in illegal, overweight coal trucks. Because of the dangerous conditions on these roads resulting from the operation of illegal, overweight coal trucks by TVA contractors, the economic, medical, environmental, recreational, and aesthetic well-being of SOCM members is adversely affected and injured.

6. Specifically, the automobiles driven and owned by SOCM members are constantly being damaged and depreciated in value as a result of the structural road damage caused by the continuous operation of illegal, overweight coal trucks by TVA contractors. The hazardous road conditions also pose grave safety problems for SOCM members who must drive these roads daily. On information and belief, SOCM members are further injured by having to pay higher tax revenues

to keep the affected roads minimally passable and by having to endure the aesthetic and environmental destruction wreaked by overweight coal trucks.

7. J. W. Bradley is a resident of Petros, Morgan County, Tennessee and lives on Highway 116, a state road over which overweight coal trucks regularly travel in route to TVA's Kingston Steam Plant. He is a taxpayer of the State of Tennessee and President of Save Our Cumberland Mountains, Inc.

IV. DEFENDANTS

8. The Tennessee Valley Authority, with headquarters in Knoxville, Tennessee, is a federal agency and government corporation "charged with the duty of constantly studying the whole situation presented by the Tennessee River Valley, and the adjoining territory, with the view of encouraging and guiding in the orderly and balanced development of the diverse and rich resources of that section." H.R. Rep. No. 48, 73d Cong., 1st Sess. 10-11 (1933). In implementing its general purposes under 16 U.S.C. Sec. 831 v, one of which is to ensure "the economic and social well-being of the people living in said river basin," TVA conducts a variety of developmental and conservational activities, including the production of electric power.

9. The TVA Board of Directors is mandated by 16 U.S.C. Sec. 831a(g) to direct the exercise of all the powers of the Corporation.

10. Aubrey Wagner is the Chairman of the Board

of Directors of TVA and is the official directly responsible for the acts, policies, and practices of all TVA operations.

V. FACTS

11. As an integral part of their electric power generation activity, TVA contracts for the procurement of coal from private surface and deep mine operators, many of whom transport this coal by truck directly to TVA power generating facilities, in particular, the Kingston Steam Plant, Kingston, Tennessee.

12. The weight of these trucks is explicitly regulated by Tennessee Code Annotated Sec. 59-1109 (1955), which provides in pertinent part:

> *Maximum weight per single axle or group of axles allowed.* — "Except as other provided by law, no freight motor vehicle shall be operated over, on, or upon the public highways of this state whre the total weight on a single axle, or any group of axles, exceeds the weight limitations set forth below in subsections A, B, C, D, E, and F.
>
> A. No axle shall carry a load in excess of eighteen thousand (18,000) pounds, provided that no front axle on truck tractors as defined in Sec. 59-104 shall carry a load in excess of twelve thousand (12,000) pounds.
>
> Axle combinations and fifth wheel placement on the tractors shall insure equal weight distribution on weight carrying axle combinations and such axle combinations shall be equipped with brakes having power motivation.

An axle load as set out herein is defined as the total load transmitted to the road by all wheels whose centers may be included between two (2) parallel transverse vertical planes, forty (40) inches apart, extending across the full width of the vehicle.

B. The total gross weight concentrated on the highway surface from any tandem axle group shall not exceed thirty-two thousand (32,000) pounds for each such tandem axle group. A "tandem axle group" is defined to be two (2) or more axles spaced forty (40) inches or more apart from center to center having at least one (1) common point of weight suspension.

C. No freight motor vehicle, truck tractor, trailer or semitrailer, nor combinations of such vehicles, shall be operated over, on or upon the public highways of this state where the total gross weight of such vehicle, or combination thereof including the load thereof, exceeds seventy-three thousand two hundred eighty (73,280) pounds, except such vehicles, or combinations thereof, operate under special permits not authorized by law; provided, that wherever a maximum permissive gross weight of seventy-three thousand two hundred eighty (73,280) pounds or a length of fifty (50) feet or a height of thirteen and one-half (13½) feet is authorized for any vehicle or combination of vehicles, it is the legislative intent that the prescribed weight, height and length shall be strictly enforced and it shall be unlawful for any state, county, or municipal officer to allow or permit any additional weight, height or length by way of tolerance or otherwise, except that the commissioner of highways may issue special permits as provided by Sec. 59-1111.

D. A freight motor vehicle, as used in this section, includes both the tractor or truck and the trailer, semitrailer or trailers, if any, and the weight of any such combination shall not exceed the maximum fixed herein; provided, however, that no freight motor vehicle with motive power shall haul more than one (1) vehicle.

13. Violation of Sec. 59-1109 is governed by Tenn. Code Ann. Sec. 59-1112, which provides in pertinent part:

Penalty for violation of Sec. 59-1107 — 59-1111 — Injunction proceedings — Disposition of fines, penalties and forfeitures. — Each violation of Sec. 59-1107 — 59-1109 and each violation of restrictions on the maximum gross weight of freight motor vehicles duly adopted and promulgated by the commissioner of highways, under 59-1111, and each violation of rules and regulations duly adopted and promulgated by the commissioner of safety under said section, shall be a misdemeanor and, upon conviction thereof, a fine of not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500) shall be assessed. Any taxpayers of the state shall have the right by injunction proceedings to enjoin any actual or threatened use of any highway prohibited by said sections. All fines, penalties and forfeitures of bonds imposed or collected under this section shall be paid within ten (10) days after receipt thereof to the department of safety with a statement accompanying the same, setting forth the action or proceedings in which such moneys were collected, the name and residence of the defendant, the nature of the offense, and fine, penalty, or forfeiture imposed. Provided, however, where

said fines, penalties and forfeitures are imposed because of arrests made by employees of the Department of Revenue, the same shall be paid over immediately to the commissioner of revenue, who is authorized to take all steps necessary to enforce the collection and prompt return thereof. Such fines, penalties and forfeitures when so collected by either the Department of Safety or the commissioner of revenue shall be deposited with the Treasurer of the State and shall become a part of the general funds of the state.

14. Upon arrival at the Kingston Steam Plant, a federal reservation, the trucks are initially weighed on official TVA scales and then permitted to dump their load.

15. Despite the clear language of Tennessee law, it is the officially announced policy and practice of TVA to accept at its Kingston Steam Plant coal, pursuant to contract, from trucks operating in violation of Tenn. Code Ann. Sec. 59-1109. This pattern and practice encompasses a vast majority of the trucks that enter the facility. Official TVA daily truck scales reports reveal the following figures for a randomly selected time period:

Date	No. Trucks On Scales	No. Trucks Overweight	Percent Overweight	Heaviest Load
9/15/72	277	258	91	100,000 lbs.
9/18/72	369	345	93	100,000 lbs.
9/19/72	346	315	91	95,600 lbs.
9/20/72	289	262	91	98,700 lbs.

16. In traveling to the Kingston Steam Plant, these trucks drive over numerous county, state, and,

on information and belief, federal roads and highways, causing extensive damage to these thoroughfares in the form of large potholes, bumps, and other types of serious structural damage and decay.

17. On or about August 10, 1972, TVA initiated a policy of rejecting coal deliveries brought to the Kingston Steam Plant in illegal, overweight trucks operated by short-term (spot) contractors. TVA claimed that the authority to reject these deliveries emanated from recently inserted contract provisions reserving to TVA the right to reject trucks carrying more coal than state law permitted. Since similar provisions were not present in TVA's contracts with long-term operators, TVA simultaneously continued to accept deliveries from long-term contractors despite the fact that these deliveries were made in trucks exceeding Tennessee weight laws.

18. On or about August 16, 1972, TVA publicly announced that it was abandoning its efforts to enforce the overload provisions in spot contracts and would revert to its former policy and practice of accepting all coal deliveries from trucks operating in violation of Tennessee weight law. This policy and practice is currently in effect.

19. On or about August 25, 1972, SOCM wrote TVA expressing its profound concern over TVA's policy and practice relating to the operation of overweight coal trucks at the Kingston Steam Plant, informed TVA of the injury to its members, and demanded that this policy and practice be changed in

favor of a policy and practice of blanketly rejecting all trucks not in conformance with Tennessee weight law (a copy of the letter is attached to this Complaint as Attachment A and made a part hereof).

20. TVA responded by reaffirming its policy of accepting illegal, overweight coal trucks and relied on its contracts with long-term operators as a justification for its actions (a copy of the letter is attached to this Complaint as Attachment B and made a part hereof).

VI. VIOLATIONS OF LAW

21. TVA's acts, policy, and practice relating to the acceptance of illegal, overweight coal trucks frustrate and thwart sharply defined state policies as evidenced by Tenn. Code Ann. Sec. 59-1109, 59-1112, penal statutes enacted to protect the Tennessee highways from damage and the safety of all persons using them.

22. TVA's acts, policy and practice foster and encourage violation of federal law and policy as specifically alleged in paragraphs 23, 24, 25, 26.

23.a) The Kingston Steam Plant is a federal reservation over which this court has exclusive jurisdiction.

b) 18 U.S.C. Sec. 13 adopts the Tennessee weight laws and other Tennessee laws as federal law on federal property and makes the violation of these laws a federally cognizable crime.

c) TVA's acts, policy, and practice illegally

involve TVA in the commission of a federally cognizable crime.

24. TVA's acts, policy, and practice violate national substantive environmental policy as expressed in 42 U.S.C. Sec. 4321 *et seq.* (National Environmental Policy Act of 1969) (hereinafter NEPA).

25.a) TVA failed to comply with NEPA, 42 U.S.C. Sec. 4332 (2)(c), by not including in its environmental impact statement ("Final Environmental Statement — Policies Relating to Sources of Coal Used by the Tennessee Valley Authority for Electric Power Generation" — TVA-OHES-E15-71-4), filed with the Council on Environmental Quality, a detailed discussion, as required by NEPA, 42 U.S.C. Sec. 4332 (a)(c)(i) & (ii), of the environmental impact of and unavoidable adverse environmental effects of TVA's policy and practice relating to the acceptance of illegal, overweight coal trucks.

b) TVA's environmental impact statement also failed entirely to discuss, as required by NEPA, 42 U.S.C. Sec. 4332 (2)(c)(iii), alternatives to TVA's current policy and practice and the environmental impact of these alternatives.

c) TVA's current policy and practice represents an integral part of TVA's involvement in the coal mining industry.

26.a) TVA's acts, policy, and practice foster and encourage violation of the weight limitation (73,280 pounds) for federal-aid highways contained in 23 U.S.C. Sec. 127 (Federal-Aid Highways Act of 1956).

b) TVA's acts, policy, and practice foster and encourage violation of the regulations governing truck safety promulgated by the Department of Transportation, Federal Highway Administration, 49 C.F.R. Sec. 392.2, 392.9, 393.85, which prescribe standards for vehicle cargo distribution.

27. TVA's acts, policy, and practice violate Congress's declaration of developmental assistance policy expressed in 42 U.S.C. Sec. 4231 *et seq.* (Intergovernmental Cooperation Act of 1968), which requires federal agencies to cooperate with state officials in the promotion of economic development.

28. TVA's acts, policy, and practice are outside, in excess of, and contrary to TVA's statutory authority as embodied in 16 U.S.C. Sec. 831 *et seq.* (The Tennessee Valley Authority Act of 1933) and constitute an abuse of the agency's discretion thereunder and under TVA's own regulations in the following respects:

a) TVA's acts, policy, and practice violate its mandate, as expressed in 16 U.S.C. Sec. 831, 831 v, to ensure "the economic and social well-being of the people living in said river basin."

b) TVA's acts, policy, and practice violate its general mandate, as expressed throughout 16 U.S.C. Sec. 831 *et seq.* of promoting orderly economic development and maximum conservation throughout the areas of its operations.

c) TVA's acts, policy, and practice violate its own administrative regulations, entitled Ethical and

Other Conduct Standards and Responsibilities of Employees and Special Government Employees. 18 C.F.R. Sec. 300.735-1, 300.735-11(f), 300.735-19, 300-735-20, 300.735-35, 300.735-36. These regulations establish a code of conduct for all TVA employees and emphasize the special obligations and duties of federal government personnel. By encouraging and fostering violation of national and state laws and policies and frustrating their effectiveness, TVA is acting contrary to its own prescribed standards of conduct.

VII. EQUITY

29. There is an actual controversy among the parties. Plaintiffs are suffering and will continue to suffer irreparable injury by virtue of the defendants' acts, policy, and practice relating to illegal, overweight coal trucks. Unless restrained, the defendants will continue their acts, policy, and practice. Plaintiffs have no adequate remedy at law. Plaintiffs have exhausted their administrative remedies.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray as follows:

1. That this court issue a declaratory judgment that the acts, policy, and practice of defendants in accepting illegal, overweight coal trucks:

a) Violate and frustrate sharply defined Tennessee policy as evidenced by Tenn. Code Ann. Sec. 59-1109, 59-1112.

b) Violate and frustrate declared national policy as expressed in the Federal-Aid Highways Act of 1956, the regulations of the Department of Transportation, the National Environmental Policy Act of 1969, the Intergovernmental Cooperation Act of 1968, and the fundamental federal policy against the commission of crimes on federal property.

c) Do not comply with NEPA, 42 U.S.C. Sec. 4332 (2) (c).

d) Exceed and contravene TVA's statutorily authorized functions as expressed in 16 U.S.C. 831 *et seq.* and TVA's own regulations.

2. That this court issue a preliminary and permanent injunction prohibiting the defendants, their officers, agents, employees, successors, and attorneys, and all other persons in active concert and participation with them from executing their policy of knowingly and willingly accepting at TVA's Kingston Steam Plant or any other TVA facility, coal received in trucks operating in violation of Tennessee weight laws.

3. That this court issue an order pursuant to U.S.C. Sec. 1361 ordering defendants TVA, TVA's Board of Directors, and Aubrey Wagner, to observe TVA's mandate and regulations, NEPA, and defined national and state policies as elaborated herein, which require them to accept coal under weight restrictions established by Tennessee law and under circumstances that will not adversely affect the environment of the affected area.

4. That this court advance the matter on its docket, order a speedy hearing at the earliest practicable date, and cause this case to be in every way expedited.

5. That this court grant the plaintiffs such other and additional relief as justice may require, together with costs and disbursements of this action.

Respectfully submitted,

/s/ Dean Hill Rivkin
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